REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.4184 OF 2009

State of West Bengal & Ors. …. Appellants

Versus

Calcutta Club Limited … Respondent

AND

CIVIL APPEAL NO. 7497 OF 2012

Chief Commissioner of Central Excise and Service & Ors. …. Appellants

Versus

M/s. Ranchi Club Ltd. … Respondent

WITH

CIVIL APPEAL NO. 7773 OF 2019
(ARISING OUT OF SLP (C) NO.26883 OF 2013)

WITH

CIVIL APPEAL NO. 7771 OF 2019
(ARISING OUT OF SLP (C) NO.22909 OF 2013)

WITH

CIVIL APPEAL NO. 7772 OF 2019
(ARISING OUT OF SLP (C) NO.24977 OF 2013)

WITH

CIVIL APPEAL NOS.4377-4380 OF 2015

WITH

CIVIL APPEAL NO.5157 OF 2015

WITH

CIVIL APPEAL NO.7030 OF 2015

WITH

CIVIL APPEAL NO.8543 OF 2015

WITH

CIVIL APPEAL NO.7259 OF 2015

WITH

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CIVIL APPEAL NO.7924 OF 2015
WITH
CIVIL APPEAL NO. 7774 OF 2019
(ARISING OUT OF SLP (C) NO.33249 OF 2015)
WITH
CIVIL APPEAL NO. 7775 OF 2019
(ARISING OUT OF SLP (C) NO.151 OF 2016)
WITH
CIVIL APPEAL NO. 7781 OF 2019
(ARISING OUT OF SLP (C) NO.2491 OF 2016)
WITH
CIVIL APPEAL NO. 7780 OF 2019
(ARISING OUT OF SLP (C) NO.2494 OF 2016)
WITH
CIVIL APPEAL NO. 7783 OF 2019
(ARISING OUT OF SLP (C) NO.2490 OF 2016)
WITH
CIVIL APPEAL NO. 7778 OF 2019
(ARISING OUT OF SLP (C) NO.4158 OF 2016)
WITH
CIVIL APPEAL NO. 7779 OF 2019
(ARISING OUT OF SLP (C) NO.4156 OF 2016)
WITH
CIVIL APPEAL NO. 7777 OF 2019
(ARISING OUT OF SLP (C) NO.4157 OF 2016)
WITH
CIVIL APPEAL NO.5946 OF 2016
WITH
CIVIL APPEAL NO.5949 OF 2016
WITH
CIVIL APPEAL NO.6593 OF 2016
WITH
CIVIL APPEAL NOs.7366-7367 OF 2016
WITH
CIVIL APPEAL NO.626 OF 2017
WITH
CIVIL APPEAL NO. 7776 OF 2019
(ARISING OUT OF SLP (C) NO.33377 OF 2016)
WITH
CIVIL APPEAL NO.3584 OF 2017

WITH

CIVIL APPEAL NO.5087 OF 2017

WITH

CIVIL APPEAL NOs.3819-3821 OF 2017

WITH

WRIT PETITION (CIVIL) NO. 321 OF 2017

WITH

CIVIL APPEAL NO.10674 OF 2017

WITH

CIVIL APPEAL NO.11224 OF 2017

WITH

CIVIL APPEAL NOs.72-73 OF 2018

WITH

CIVIL APPEAL NO.104 OF 2019

WITH

CIVIL APPEAL NO. 7790 OF 2019
(D.NO.5100 OF 2019)

WITH

CIVIL APPEAL NO.5338 OF 2019

WITH

CIVIL APPEAL NOs.5215-5217 OF 2019

WITH

CIVIL APPEAL NO. 7789 OF 2019
(D.NO.20271 OF 2019)

J U D G M E N T

R.F. Nariman, J.

C.A. No.4184 of 2009

1. This Appeal arises out of a reference order by a Division Bench of this Court, reported in **State of West Bengal v. Calcutta Club Limited** (2017) 5 SCC 356. The facts of Civil Appeal No. 4184 of 2009 are set out in the said reference order as follows:

"**2.** The facts that are necessary to be stated are that the Assistant Commissioner of Commercial Taxes issued a notice to the respondent Club assessee apprising it that it had failed to make payment of sales tax on sale of food and drinks to the permanent members during the quarter ending 30-6-2002. After the receipt of the notice, the respondent Club submitted a representation and the assessing authority required the respondent Club to appear before it on 18-10-2002. The notice and the communication sent for personal hearing was assailed by the respondent before the Tribunal praying for a declaration that it is not a dealer within the meaning of the Act as there is no sale of any goods in the form of food, refreshments, drinks, etc. by the Club to its permanent members and hence, it is not liable to pay sales tax under the Act. A prayer was also made before the Tribunal for nullifying the action of the Revenue threatening to levy tax on the supply of food to the permanent members.

3. It was contended before the Tribunal that there could be no sale by the respondent Club to its own permanent members, for doctrine of mutuality would come into play. To elaborate, the respondent Club treated itself as the agent of the permanent members in entirety and advanced the stand that no consideration passed for supplies of food, drinks or beverages, etc. and there was only reimbursement of the amount by the members and therefore, no sales tax could be levied.

4. The Tribunal referred to Article 366(29-A) of the Constitution of India, Section 2(30) of the Act, its earlier decision in *Hindustan Club Ltd.* v. *CCT* [*Hindustan Club Ltd.* v. *CCT*, (1995) 98 STC 347 (Tri)] , distinguished the authority rendered in *Automobile Assn. of Eastern India* v. *State of W.B.* [*Automobile Assn. of Eastern India* v. *State of W.B.*, (2017) 11 SCC 811 : (2002) 40 STA 154 (SC)] and, eventually, opined as follows:

"Considering the relevant fact presented before us and the different judgments of the Supreme Court and the High Court we find that supplies of food, drinks and refreshments by the petitioner clubs to their permanent members cannot be treated as "deemed sales" within the

meaning of Section 2(30) of the 1994 Act. We find that the payments made by the permanent members are not considerations and in the case of Members' Clubs the suppliers and the recipients (Permanent Members) are the same persons and there is no exchange of consideration.”

Being of this view, the Tribunal accepted the contention of the respondent Club and opined that it is not eligible to tax under the Act.

5. Being dissatisfied with the aforesaid order passed by the Tribunal, the Revenue preferred a writ petition and the High Court opined that the decision rendered in *Automobile Assn. of Eastern India* [*Automobile Assn. of Eastern India* v. *State of W.B.*, (2017) 11 SCC 811 : (2002) 40 STA 154 (SC)] , was not a precedent and came to hold that reading of the constitutional amendment, as well as the provisions of the definition under the Act, it was clear that supply of food, drinks and beverages had to be made upon payment of consideration, either in cash or otherwise, to make the same exigible to tax but in the case at hand, the drinks and beverages were purchased from the market by the Club as agent of the members. The High Court further ruled that the members collectively was the real life and the Club was a superstructure only and, therefore, mere fact of presentation of bills and non-payment thereof consequently, striking off membership of the Club, did not bring the Club within the net of sales tax. The High Court further opined that in the obtaining factual matrix the element of mutuality was not obliterated. The expression of the aforesaid view persuaded the High Court to lend concurrence to the opinion projected by the Tribunal.

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9. At the very outset, we may mention certain undisputed facts. It is beyond cavil that the respondent is an incorporated entity under the Companies Act, 1956. The respondent assessee charges and pays sales tax when

it sells products to the non-members or guests who accompany the permanent members. But when the invoices are raised in respect of supply made in favour of the permanent members, no sales tax is collected."

2. After setting out the definition of "sale" in Section 2(30) of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as the "West Bengal Sales Tax Act") and Article 366(29-A) of the Constitution of India, the Court then referred to the Constitution Bench decision in **C.T.O. v. Young Men's Indian Association** (1970) 1 SCC 462 as follows:

> "**14.** Earlier the Constitution Bench decision in *CTO* v. *Young Men's Indian Assn.* [*CTO* v. *Young Men's Indian Assn.*, (1970) 1 SCC 462] dealing with the liability of a club to pay sales tax when there is supply of refreshment to its members, the Court had concluded thus: (SCC pp. 467-68, para 11)
>
> "*11.* The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Schedule VII List II Entry 54 to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(*n*) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be eligible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court."

3. After then referring to a number of decisions on the doctrine of mutuality, the Court observed:

> "**23.** In the light of the aforesaid position and the law of mutual concerns, we have to ascertain the impact and the effect of sub-clause (*e*) to clause (29-A) to Article 366 of the Constitution of India, as enacted vide 46th Amendment in 1982 and applicable and applied to sales or VAT tax. The said clause refers to tax on supply of goods by an unincorporated association or body of persons. The question would be whether the expression "body of persons" would include any incorporated company, society, association, etc. The second issue is what would be included and can be classified as transactions relating to supply of goods by an unincorporated association or body of persons to its members by way of cash, deferred payment or valuable consideration. Such transactions are treated and regarded as sales. The decisions of the Court in *Fateh Maidan Club* [*Fateh Maidan Club* v. *CTO*, (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] and *Cosmopolitan Club* [*Cosmopolitan Club* v. *State of T.N.*, (2017) 5 SCC 635 : (2009) 19 VST 456 (SC)] in that context have drawn a distinction when a club acts as an agent of its members and when the property in the goods is sold i.e. the property in food and drinks is passed to the members. The said distinction, it is apparent to us, has been accepted by the two Benches. However, the decisions do not elucidate and clearly expound, when the club is stated and could be held as acting as an agent of the members and, therefore, would not be construed as a party which had sold the goods. The agency precept necessarily and possibly refers to a third party from whom the goods i.e. the food and drinks had been sourced and provided to by the club acting as an agent of the members, to the said members. These are significant and relevant facets which must be elucidated and clarified so that there is no ambiguity in appreciating and understanding the aforesaid concepts "acting as an agent of the members" or when property is transferred in the goods sold to the members."

4. The Division Bench then set out 3 questions to be answered by a larger Bench as follows:

> "**30.1.** (*i*) Whether the doctrine of mutuality is still applicable to incorporated clubs or any club after the 46th Amendment to Article 366(29-A) of the Constitution of India?
>
> (*ii*) Whether the judgment of this Court in *Young Men's Indian Assn.* [*CTO* v. *Young Men's Indian Assn.*, (1970) 1 SCC 462] still holds the field even after the 46th Amendment of the Constitution of India; and whether the decisions in *Cosmopolitan Club* [*Cosmopolitan Club* v. *State of T.N.*, (2017) 5 SCC 635 : (2009) 19 VST 456 (SC)] and *Fateh Maidan Club* [*Fateh Maidan Club* v. *CTO*, (2017) 5 SCC 638 : (2008) 12 VST 598 (SC)] which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law?
>
> (*iii*) Whether the 46th Amendment to the Constitution, by deeming fiction provides that provision of food and beverages by the incorporated clubs to its permanent members constitute sale thereby holding the same to be liable to sales tax?"

5. Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of the Appellants, referred to the 'Sixty-First Law Commission Report on Certain Problems Connected With Powers of the States to Levy a Tax on the Sale of Goods and with the Central Sales Tax Act, 1956 (May, 1974)' (hereinafter referred to as the "61st Law Commission Report"), which preceded the enactment of Article 366(29-A) of the Constitution of India; the 'Statement of Objects and Reasons' appended to the Constitution

(Forty-sixth Amendment) Bill, 1981 [enacted as the Constitution (Forty-sixth Amendment) Act, 1982] (hereinafter referred to as the "Statement of Objects and Reasons"), which led to the insertion of Article 366(29-A); and then referred, in particular, to Article 366(29-A)(e) and (f). According to the learned Senior Advocate, 366(29-A)(e) was inserted in order to do away with the doctrine of agency/trust or mutuality, insofar as it applied to members' clubs and, therefore, sought to do away with the basis of the judgment in **Young Men's Indian Association** (supra). He argued that the language of 366(29-A)(e) did away with transfer of property in goods and was specifically differently worded from 366(29-A)(a) and (b), which referred to such transfer. According to him, the expression "unincorporated association or body of persons" in sub-clause (e) must be read disjunctively, and so read would include incorporated persons such as companies, cooperative societies, etc. According to him, it is important to construe a provision of the Constitution broadly, and in consonance with the object sought to be achieved, that being, to do away with the doctrine of mutuality in all its forms. According to him, even assuming that "body of persons" under 366(29-A)(e) did not include incorporated persons, 366(29-A)(f) would take within its wide sweep the supply of goods, being food or any other article

for human consumption or drink, given that sub-clause (f) does not refer to incorporated or unincorporated bodies, and takes within its sweep a tax in the supply of goods “in any other manner whatsoever”, which are words of extremely wide import. He then took us through the West Bengal Sales Tax Act and referred to the definition of “dealer” in Section 2(10) and “sale” in Section 2(30), and then adverted to the charging Section 9 of the aforesaid Act. According to him, a reading of the definition of “dealer” and explanation (1) thereof in particular, would make it clear that the explanation is not really an explanation in the classical sense, but seeks to rope in members’ clubs which sell goods to their members. Thus, the explanation stands apart from the main part of the definition of “dealer”, which requires a person to carry on the business of selling and purchasing goods. He then relied heavily on **Deputy Commercial Tax Officer, Saidapet & Anr. v. Enfield India Ltd., Co-operative Canteen Ltd.** (1968) 2 SCR 421 for the proposition that the English cases which dealt with the doctrine of mutuality had no application in the context of a taxing statute, as these judgments dealt with criminal liability. He also relied strongly on this judgment to show that profit-motive is totally unnecessary where a supply of goods by a club to its members, falls within the definition of “sale” under the Madras General Sales

Tax Act, 1959 in that case. He also distinguished **Inland Revenue Commissioners v. Westleigh Estates Company, Limited** 1924 K.B. 390 from the present case, by stating that all observations on mutuality were made in the context of whether a business corporation's profits could be brought to tax. He instead relied upon the observations made in **Walter Fletcher v. Income Tax Commissioner** (1972) Appeal Cases 414, stating that the mutuality principle was not of universal application, even when it applied to members' clubs, and it is important to find out in the facts of a case when relationship of mutuality ends and when trading begins. In any case, according to the learned Senior Advocate, the doctrine of mutuality has no application when a members' club is in the corporate form, as it is clear from **Bacha F. Guzdar v. Commissioner of Income Tax, Bombay** (1955) 1 SCR 876, where it was held that a shareholder is not the owner of the assets of a company and, therefore, the aforesaid principle cannot possibly apply to members' clubs in corporate form. According to him, it makes no difference that the company is one registered under Section 25 of the Companies Act, 1956 ("hereinafter referred to as the "Companies Act"), as is the case in the appeal in the present case.

6. Shri Jaideep Gupta, learned Senior Advocate appearing on behalf of the Respondent, has on the other hand referred to Section 2(5) of the West Bengal Sales Tax Act, and stated that the very first pre-requisite for falling within the provisions of that Act is that there should be a profit motive, as defined, and since there is none in members' clubs, the charging section will not be attracted on the facts of these cases. He relied strongly upon **State of Gujarat v. Raipur Manufacturing Co. Ltd.** (1967) 1 SCR 618, for the proposition that the expression "profit-motive" does not refer to surplus being made, but only refers to a motive of making money from sale transactions. He then referred to Section 25 of the Companies Act and, in particular, Section 25(1)(b), which states that a company is registered under Section 25 only if it intends to apply its profits and other income in promoting its objects, and prohibits payment of dividend to its members. For this reason, the ratio of **Bacha F. Guzdar** (supra) cannot possibly apply to members' clubs in the form of Section 25 companies. He then referred to the Statement of Objects and Reasons, which according to him, made it clear that only unincorporated clubs or associations of persons were referred to in Article 366(29-A)(e). He also argued that under no circumstances can a company be fitted within "body of persons", as a result of which Article 366(29-

A)(e) will not apply to sales of food or refreshments by a club to its members. According to him, the Constitution (Forty-sixth Amendment) Act, 1982 ("hereinafter referred to as the "46th Amendment"), which inserted Clause (29-A) into Article 366 of the Constitution, has not done away with the **Young Men's Indian Association** (supra), as there cannot possibly be a supply of goods by one person to itself; and that, therefore, the doctrine of agency/trust/mutuality continues as before. He referred to the definition of "consideration" in Section 2(d) of the Indian Contract Act, 1872, which according to him made it clear that consideration must flow from one person to another and in the absence of two players, as in the case of **Young Men's Indian Association** (supra), Article 366(29-A) would have no application. When it came to the application of 366(29-A)(f), Shri Gupta stated that it is clear that (f) was enacted for a very different purpose, namely, to get over the judgment of **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi** (1978) 4 SCC 36, which dealt with the service element contained in a bill for food or drinks being consumed in restaurants. The expression "in any other manner whatsoever" only seeks to re-emphasise that where goods are supplied in such restaurants, then the service element will not interdict the State Legislature from taxing food etc. under Article

366(29-A)(f). In any case, going back to sub-clause (e), the learned Senior Advocate said that it is clear that the expression "unincorporated associations" must be read as *ejusdem generis* with "body of persons" and so read would not include members' clubs in corporate form.

7. Having heard the learned Senior Advocates on behalf of both sides, it is important to first set out the relevant Constitutional and statutory provisions. Article 366(29-A) reads as follows:

> "**366. (29-A)** "**tax on the sale or purchase of goods**" includes—
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of

those goods by the person to whom such transfer, delivery or supply is made;”

8. The relevant Sections in the West Bengal Sales Tax Act are also set out hereinbelow:

“**2. Definitions**

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(5) “business” includes—

(a) any trade, commerce, manufacture, execution of works contract or any adventure or concern in the nature of trade, commerce, manufacture or execution of works contract, whether or not such trade, commerce, execution of works contract, adventure or concern is carried on with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, execution of works contract, adventure or concern; and

(b) Any transaction in connection with, or ancillary or incidental to, such trade, commerce, manufacture, execution of works contract, adventure or concern;

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(10) “dealer” means any person who carries on the business of selling or purchasing goods in West Bengal or any person making sales under section 15, and includes—

(a) an occupier of a jute-mill or shipper of jute;

(b) Government, a local authority, a statutory body, a trust or other body corporate which, or a liquidator or a receiver appointed by a Court in respect of a person, being a dealer as defined in this clause, who, whether or not in the course of business, sells, supplies or distributes directly or otherwise goods for cash or for deferred payment or for

commission, remuneration or other valuable consideration.

Explanation I: A co-operative society or a club or any association which sells goods to its members is a dealer.

Explanation II: A factor, a broker, a commission agent, a del credere agent, an auctioneer, an agent for handling or transporting of goods or handling of document of title to goods or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals, is a dealer;

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(30) "sale" means any transfer of property in goods for cash, deferred payment or other valuable consideration, and includes-

(a) any transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) any delivery of goods on hire-purchase or any system of payment by instalments;

(c) any transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(d) any supply, by way of, or as part of, any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink(whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

(e) any supply of goods by any unincorporated association or body of persons to a member

thereof for cash, deferred payment or other valuable consideration,

and such transfer, delivery, or supply of any goods shall be deemed to be a sale of those goods by the person or unincorporated association or body of persons making the transfer, delivery, or supply and a purchase of those goods by the person to whom such transfer, delivery, or supply is made, but does not include a mortgage, hypothecation, charge or pledge.

Explanation: A sale shall be deemed to take place in West Bengal if the goods are within West Bengal –

(a) In the case of specific or ascertained goods, at the time of the contract of sale is made; and

(b) In the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller, whether the assent of the buyer to such appropriation is prior or subsequent to the appropriation:

PROVIDED that where there is a single contract of sale in respect of goods situated in West Bengal as well as in places outside West Bengal, provisions of this Explanation shall apply as if there were a separate contract of sale in respect of the goods situated in West Bengal.

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9. Incidence of tax on sale

(1) Subject to the provisions of this Act, with effect from the appointed day –

(a) Every dealer –

(i) who has been liable immediately before the appointed day to pay tax under section 4 or section 8 of the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941), and who

would have continued to be so liable on such appointed day under that Act had this Act not come into force, or

(ii) whose gross turnover during a year first exceeds the taxable quantum as applicable to him under the Bengal Finance (Sales Tax) Act, 1941, on the day immediately preceding the appointed day,

(b) Every dealer registered under the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of 1954), who is in possession of a registration certificate under that Act on the day immediately before the appointed day, and to whom clause (a) does not apply, and

(c) Every dealer registered under the West Bengal Motor Spirits Sales Tax Act, 1974, (West Bengal Act XI of 1974), who is in possession of a registration certificate under that Act on the day immediately before the appointed day, and to whom clause (a) or clause (b) does not apply,

shall be liable to pay tax under this Act on all sales, other than those referred to in section 15, effected on or after the appointed day.

(2) Every dealer to whom sub-section (1) does not apply shall, if his gross turnover of sales calculated from the commencement of any year exceeds the taxable quantum at any time within such year, be liable to pay tax under this Act on all sales, other than those referred to in section 15, effected on and from the date immediately following the day on which such gross turnover of sales first exceeds the taxable quantum.

(3) In this Act the expression “taxable quantum” means-

(a) In relation to any dealer who imports for sale any goods, other than those specified in Schedule IV, into West Bengal, 30,000 Rupees; or

(b) [***]

(c) In relation to any dealer who manufactures or produces any goods, other than those specified in Schedule IV [***] for sale, 1,00,000 rupees; or

(d)[***]

(e) In relation to any other dealer, 5,00,000 rupees, excluding turnover of sales of goods specified in Schedule IV.

(4) Every dealer who has become liable to pay tax under sub-section (1) or sub-section (2) shall continue to be so liable until the expiry of three consecutive years, during each of which his gross turnover of sales has failed to exceed the taxable quantum, and such further period after the date of such expiry as may be prescribed, and on the expiry of this later period his liability to pay tax under sub-section (1) or sub-section (2) shall cease.

Explanation: For the purposes of sub-section (4), in computing the period of three consecutive years in respect of a dealer who has become liable to pay tax under sub-section (1), the year or years which expired before the appointed day during which or each of which the gross turnover failed to exceed the taxable quantum referred to in the Bengal Finance (Sales Tax) Act, 1941, shall be included.

(5) Every dealer whose liability to pay tax under sub-section (1) or sub-section (2) has ceased under sub-section (4), shall, if his gross turnover of sales calculated from the commencement of any year again exceeds the taxable quantum at any time within such year, be liable to pay such tax on all sales, other than those referred to in Section 15, effected on and from the date immediately following the day on which such gross turnover of sales against first exceeds the taxable quantum.

(6) The Commissioner shall, after making such enquiry as he may think necessary and after giving the

dealer an opportunity of being heard, fix the date on and from which such dealer shall become liable to pay tax under sub-section (2) or sub-section (5)."

9. The 61st Law Commission Report, which deliberated on the subject matter of Article 366(29-A), dealt with sales by associations to members under Chapter 1-D. of the Report. It began by referring to **Enfield India Ltd.** (supra) and then referred to **Young Men's Indian Association** (supra) as follows:

> "**1D.3. Unincorporated associations**- Though the above case related to a co-operative society, the court (Shah, J.) did make certain observations as to the position in regard to unincorporated societies, as follows:-
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> > "In the case of an unincorporated society, club or a firm or an association, ordinarily the supply and distribution by such a society, club, firm or an association, of goods belongs to its members, may not result in sale of the goods which are jointly held for the benefit of the members of the society, club, firm or the association, when, by virtue of the relinquishment of the common rights of the members, the property stands transferred to a member in payment of a price, and the transaction may not *prima facie* be regard as a 'sale' within the meaning of the Act."
>
> But the Court made it very clear (towards the end of the judgment) that it was not called upon in this case to decide whether an *unincorporated club* which supplies goods for a price to its members, may be regarded as selling goods to its members.
>
> **1D.4. Supply by club to members not 'sale'.-** Then, there are clubs. In a case decided by the Supreme Court on appeal from Madras, the Cosmopolitan club, Madras, the Youngmen's Indian Association, Madras and the Lawley Institute, Ootacamund, filed writ petitions under

Article 226 of the Constitution, challenging the levy of sales tax under Madras General Sales Tax Act, 1959, on snacks, beverages and other articles supplied to their members or guests. The High Court held that the club was not a 'dealer' within the meaning of section 2(g), read with Explanation I, of the Madras Act and that there was no 'sale' within the meaning of section 2(h), read with Explanation I, of the Act. On appeal to the Supreme Court it was held that a member's club cannot be made subject to the provisions of the Sale Tax Act concerning sales, because the members are joint owners of all the club property. The supply of articles to a member at a fixed price by the Club cannot be regarded as a "sale";

1D.5.No 'sale' in such circumstances in England.- It is necessary to mention here that, in England, it was held in Graff v. Evans, that a transaction whereby a member of a club acquired liquor which was the property of the club was not sale but merely transfer of special property. This case was decided eleven years before the English Act relating to the sale of goods was passed in 1893.

The basis of the decision was that the transaction was a release of the rights of the other members to the "purchaser". It might have been thought, therefore, that when section 1(1) of the Sale of Goods act specifically enacted (in 1893) that—

"…………There may be a contract of sale between one part owner and another,"

The basis of *Graff v. Evans* had ceased to be valid.

It may be noted that the Indian Sale of Goods Act has a similar provision. But in *Davies v. Burnett*, a Divisional Court followed the earlier case, and the Sale of Goods Act was not even referred to. A well-known writer has stated, that "this view of the law has now been accepted for so long that it is unlikely to be upset by a higher court."

The English cases mostly relate to licensing. But the point to be noted is, that the provision in the Sale of Goods Act as to “part owner” has not come in their way.

The position in this respect, as was observed in an Australian case, is simply that “a part of the common property is appropriated to the separate use of the members, and he makes a corresponding contribution from his separate property to the common fund.” The question must, of course, always be as to the meaning of the word “sale’ or “sell” in the particular statute which comes under consideration. If no reason is seen for giving the word an extended meaning, one would think it perfectly correct to say that an ordinary unincorporated members’ club does not “sell”, in the true sense, liquor which a member obtains from the common store on payment of money to the common fund.

1D.6. General observations.- The broad general principle which constitutes a common feature of these transactions, in the absence of the transfer of property. It would appear that these transactions are not “sale”, because there is no transfer of property.

1D.6A. This, then, is the present position. The question now to be considered is , whether is desirable that the taxability of such transactions should be provided for by expanding the concept of “sale” for the purpose of the legislative power of the States,—a result which can be achieved only by amending the Constitution.

1D.7. Amendment of Constitution not needed.- We do not think that it would be appropriate to amend the Constitution of this purpose. The number of such clubs and associations would not be very large. Moreover, taxation of such transactions might discourage the co-operative movement.

1D.8. Unincorporated associations exist various arrangements.- Unincorporated associations exist in a “myriad of structural arrangements.” As a general proposition, each is liable for the activities of its members

when the activity has been authorised, supported, or ratified by the association.

1D.9. No evasion.- It should be also noted that there can be no serious question of evasion in such cases. A member really takes his own goods.

1D.10. We, therefore, do not recommend any change."

10. It will be seen from the above that the Law Commission was of the view that the Constitution ought not to be amended so as to bring within the tax net members' clubs. It gave three reasons for so doing. First, it stated that the number of such clubs and associations would not be very large; second, taxation of such transactions might discourage the cooperative movement; and third, no serious question of evasion of tax arises as a member of such clubs really takes his own goods.

11. However, despite the aforesaid, Article 366(29-A) included within it sub-clause (e).

12. At this point, it is important to refer to the Statement of Objects and Reasons which led upto the 46th Amendment. The relevant portions of the Statement of Objects and Reasons read as follows:

"Sales tax laws enacted in pursuance of the Government of India Act, 1935 as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression "sale of goods", having regard to the rule as to broad

interpretation of entries in the legislative lists, would be given a wider connotation. However, in Gannon Dunkerley's case (A.I.R. 1958 S.C. 560), the Supreme Court held that the expression "sale of goods" as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act, 1930. This decision related to works contracts.

By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in Gannon Dunkerley's case, held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e., transfer of goods from head office or a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract treats the sale of materials separately from the cost of the labour, the sale of materials would be taxable, but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as moveables. Though practically the purchaser in a hire-purchase agreement gets the goods on the date of the hire-purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to sales tax. <u>Similarly, while sale by a registered club or</u>

other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members. In the Associated Hotels of India case (A.I.R. 1972 S.C. 1131), the Supreme Court held that there is no sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel.

xxx xxx xxx

The proposed amendments would help in the augmentation of the State revenues to a considerable extent. Clause 6 of the Bill seeks to validate laws levying tax on the supply of food or drink for consideration and also the collection or recoveries made by way of tax under any such law. However, no sales tax will be payable on food or drink supplied by a hotelier to a person lodged in the hotel during the period from the date of the judgment in the Associated Hotels of India case and the commencement of the present Amendment Act if the conditions mentioned in sub-clause (2) of clause 6 of the Bill are satisfied. In the case of food or drink supplied by Restaurants this relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Limited case and the commencement of the present Amendment Act."

(emphasis supplied)

13. At this juncture, it is important to advert to the decision of this Court in **BSNL v. Union of India** (2006) 3 SCC 1. This judgment concerned itself with the nature of the transaction by which mobile phone connections are enjoyed. The question that arose before this Court was whether the transaction in question was a service transaction and not a transaction for sale or supply

of goods. In answering this question, the Court, after referring to Article 366(29-A), observed as follows:

> “**41.** Sub-clause (*a*) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (*b*) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] was directly overcome. Sub-clause (*c*) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (*d*) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan decision* [(1967) 20 STC 115 (Mad)] a lease of a negative print of a picture would be a sale. Sub-clause (*e*) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (*f*) pertains to contracts which had been held not to amount to sale in *State of Punjab* v. *Associated Hotels of India Ltd.* [(1972) 1 SCC 472 : (1972) 29 STC 474] That decision has by this clause been effectively legislatively invalidated.”

14. In the separate concurring judgment of Lakshmanan, J., the learned Judge observed thus:

> “**105.** The amendment introduced fiction by which six instances of transactions were treated as deemed sale of

goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase "tax on sale or purchase of goods" occurs. This definition changed the law declared in the ruling in *Gannon Dunkerley & Co.* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not neutralised. Each one of the sub-clauses of Article 366(29-A) introduced by the Forty-sixth Amendment was a result of ruling of this Court which was sought to be neutralised or modified. Sub-clause (*a*) is the outcome of *New India Sugar Mills Ltd.* v. *CST* [(1963) 14 STC 316 : 1963 Supp (2) SCR 459] and *Vishnu Agencies (P) Ltd.* v. *CTO* [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449] . Sub-clause (*b*) is the result of *Gannon Dunkerley & Co.* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] Sub-clause (*c*) is the result of *K.L. Johar and Co.* v. *CTO* [(1965) 2 SCR 112 : AIR 1965 SC 1082] . Sub-clause (*d*) is consequent to *A.V. Meiyappan* v. *CCT* [(1967) 20 STC 115 (Mad)] . Sub-clause (*e*) is the result of *CTO* v. *Young Men's Indian Assn. (Regd.)* [(1970) 1 SCC 462] . Sub-clause (*f*) is the result of *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi* [(1978) 4 SCC 36 : 1978 SCC (Tax) 198] and *State of Punjab* v. *Associated Hotels of India Ltd.* [(1972) 1 SCC 472 : (1972) 29 STC 474]"

15. The observations made in the judgment on sub-clause (e) cannot possibly be said to form the *ratio-decidendi* of the judgment, as what came up for consideration in that case was whether electro-magnetic waves can be said to be 'goods', so as to be the subject matter of taxation within Article 366. This was answered in the negative as follows:

> "**71.** For the reasons stated by us earlier we hold that the electromagnetic waves are not "goods" within the meaning of the word either in Article 366(12) or in the State legislations. It is not in the circumstances necessary for us to determine whether the telephone system including the telephone exchange is not goods but immovable property as contended by some of the petitioners."

In any case, paragraph 41 of the judgment, when it refers to sub-clause (e), cannot possibly refer to "incorporated" associations contrary to the plain language of sub-clause (e), which refers to "unincorporated" associations.

16. In point of fact, this Court went on to state that the judgment in **State of Madras v. Gannon Dunkerley** AIR 1958 SC 560 was not done away with altogether and actually survived the 46th Amendment in at least two respects as follows:

> "**43.** *Gannon Dunkerley* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. [*See Attorney General* v. *Edison Telephone Co. of London Ltd.*, (1880) 6 QBD 244 : 43 LT 697] But the Forty-sixth

> Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* [*State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax."

17. We have thus to discover for ourselves whether the doctrine of mutuality has been done away with by Article 366(29-A)(e), and whether the ratio of **Young Men's Indian Association** (supra) would continue to operate even after the 46th Amendment.

18. At this juncture, it is important to set out the two pillars, so to speak, on which the **Young Men's Indian Association** (supra) is largely based. In **Graff v. Evans** (1882) 8 Q.B. 373, the Grosvenor Club was incorporated in the form of a trust, the Appellant Graff acting as Manager of the club, for and on behalf of a Managing Committee, which conducted the general business of the club. Food and refreshments such as wine, beer and spirits were served to members on payment for the same. The question was whether a license was required under the Licence Act, 1872,

to sell liquor by retail. In this context, the Queen's Bench Division held:

> "I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to "sales" of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a "sale" by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be

a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor."

19. Likewise, in **Trebanog Working Men's Club and Institute Ltd. v. Macdonald** (1940) 1 K.B. 576, a similar question arose before the Kings Bench Division. **Graff** (supra) was applied and followed thus:

"In our opinion, the decision in Graff v. Evans applies to and governs the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquors remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions "trustee" or "agent." What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club. We are dealing here with a quasi-criminal case, where the Court seeks to deal with the substance of a transaction rather than the legal form in which it may be clothed."

20. The stage is now set for a consideration of the judgment in **Young Men's Indian Association** (supra). Three separate appeals were heard and decided by a Six Judge Bench of this Court in this case. The first considered the Cosmopolitan Club, Madras, which was registered under Section 26 of the Companies

Act, 1913 as a non-profit earning institution. Young Men's Indian Association was also considered, being a Society registered under the Societies Registration Act, 1860. The third case involved the Lawley Institute which came into existence by a deed of trust. In all these cases, food preparations were supplied to members at prices fixed by the club. In the Cosmopolitan Club case, a member is allowed to bring guests with him, but if any article of food is consumed by the guest, it is the member who has to pay for the same, which was similar to the position in the Young Men's Indian Association. The Madras Sales Tax Act, 1959 came up for consideration in the aforesaid judgment. This Court referring to the two English cases cited hereinabove held:

> "**7.** The law in England has always been that members' clubs to which category the clubs in the present case belong cannot be made subject to the provisions of the Licensing Acts concerning sale because the members are joint owners of all the club property including the excisable liquor. The supply of liquor to a member at a fixed price by the club cannot be regarded to be a sale. If, however, liquor is supplied to and paid for by a person who is not a bona fide member of the club or his duly authorised agent there would be a sale. With regard to incorporated clubs a distinction has been drawn. Where such a club has all the characteristics of a members' club consistent with its incorporation, that is to say, where every member is a shareholder and every shareholder is a member, no licence need be taken out if liquor is supplied only to the members. If some of the shareholders are not members or some of the members are not shareholders that would be the case of a proprietary club and would involve sale. Proprietary clubs

stand on a different footing. The members are not owners of or interested in the property of the club. The supply to them of food or liquor though at a fixed tariff is a sale. (See *Halsbury's Laws of England*, 3rd Edn., Vol. 5, pp. 280-281). The principle laid down in *Graff* v. *Evans* [(1882) 8 QBD 373] had throughout been followed. In that case Field, J., put it thus:

"I think the true construction of the Rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods."

The difficulty felt in the legal property ordinarily vesting in the trustees of the members' club or in the incorporated body was surmounted by invoking the theory of agency i.e. the club or the trustees acting as agents of the members. According to Lord Hewart (L.C.J.)in *Trebanog Working Men's Club and Institute Ltd.* v. *Macdonald* [(1940) 1 AELR 454] once it was conceded that a members' club did not necessarily require a licence to serve its members with intoxicating liquor it was difficult to draw any distinction between the various legal entities which might be entrusted with the duty of holding the property on behalf of members, be it an individual or a body of trustees or a company formed for the purpose so long as the real interest in the liquor remained in the members of the club. What was essential was that the holding of the property by the agent or trustee must be a holding for and on behalf of and not a holding antagonistic to members of the club.

8. In the various cases which came to be decided by the High Courts in India the view which had prevailed in England was accepted and applied. We may notice the decisions of the Madhya Pradesh High Court in *Bengal Nagpur Cotton Mills Club*, *Rajnandangaon* v. *Sales Tax Officer, Raipur* [8 STC 781] and of the Mysore High Court in *Century Club* v. *State of Mysore* [16 STC 38] . In the former it was held that the supply to the member of a members' club registered under Section 26 of the Indian Companies Act, 1913 of refreshments purchased out of club funds which consisted of members' subscription was

not a transfer of property from the club as such to a member and the club was not liable to Sales Tax under the C.P. and Berar Sales Tax Act, 1947, in respect of such supplies of refreshments. The principle adverted to in *Trebanog Working Men's Club* was adopted and it was said that if the agent or a trustee supplied goods to the members such supplies would not amount to a transaction of sale. The Mysore court expressed the same view that a purely members' club which makes purchases through a Secretary or Manager and supplies the requirements to members at a fixed rate did not in law sell those goods to the members."

21. The judgment heavily relied upon by Shri Dwivedi, namely, **Enfield India Ltd.** (supra) was then distinguished thus:

"**9.** On behalf of the appellants reliance has been placed on a decision of this Court in *Deputy Commercial Tax Officer* v. *Enfiend India Ltd.* [(1968) 2 SCR 421] In that case the Explanation to Section 2(*g*) was found to be intra vires and within the competence of the State Legislature. The judgment proceeded on the footing that when a cooperative society supplied refreshments to its members for a price the following four constituent elements of sale were present: (*1*) parties competent to contract; (*2*) mutual consent; (*3*) thing, the absolute or general property in which is transferred from the seller to the buyer and (*4*) price in money paid or promised. The mere fact that the society supplied the refreshments to its members alone and did not make any profit was not considered sufficient to establish that the society was acting only as an agent of its members. As a registered society was a body corporate it could not be assumed that the property which it held was the property of which its members were owners. The English decisions were distinguished on the ground that the courts in those cases were dealing with matters of quasi-criminal nature."

22. Finally, the Court concluded:

> "**11.** The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act, 1930. The State Legislature being competent to legislate only under Entry 54, List II, of the Seventh Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in Section 2(*n*) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be eligible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court.
>
> **12.** The final conclusion of the High Court in the judgment under appeal was that the case of each club was analogous to that of an agent or mandatory investing his own monies for preparing things for consumption of the principal, and later recouping himself for the expenses incurred. Once this conclusion on the facts relating to each club was reached it was unnecessary for the High Court to have expressed any view with regard to the vires of the Explanations to Sections 2(*g*) and 2(*n*) of the Act. As no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparation by each one of the clubs to its members."
>
> (emphasis supplied)

23. Shah, J., who was the author in **Enfield India Ltd.** (supra), arrived at the same conclusion - but without applying the English cases - stating that the English cases dealt with criminal proceedings, whereas the present case was the case of a taxing statute.

24. It can be seen that **Young Men's Indian Association** (supra) expressly distinguished **Enfield India Ltd.** (supra), in paragraph 9 therein. The judgment in **Enfield India Ltd.** (supra), held on the facts of that case that there was nothing to show that the society in that case was acting as an agent of its members in providing facilities for making food available to them. A distinction was then made between a society which is a body corporate and its members, stating that the body corporate is a separate person in law. It then referred to various English judgments including **Trebanog** (supra), and refused to apply them on the ground that they were cases which dealt with criminal proceedings. The judgment then ended by stating that the Court was not called upon to decide whether an unincorporated club, supplying goods for a price to its members, may be regarded as selling goods to its members.

25. It can be seen from the above, that the ratio of the Three Judge Bench in **Enfield India Ltd.** (supra) does not square with the ratio of the Six Judge Bench in **Young Men's Indian Association** (supra). **Young Men's Indian Association** (supra) is expressly based upon the English judgments which disregarded the corporate form and stated that there could not be a sale, on

the facts of those cases, between two persons because Foster, i.e. a member of the club, could be regarded as vendor as well as purchaser in **Graff** (supra). Likewise, in **Trebanog** (supra), the form in which the club was clothed was of no moment, it being stated that there is no magic in the expressions “trustee or agent”. What is essential is that the holding of the property by the trustee or agent must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club.

26. It is thus clear that **Enfield India Ltd.** (supra) does not take the matter any further. **Young Men’s Indian Association** (supra) made no distinction between a club in the corporate form and a club by way of a registered society or incorporated by a deed of trust. What is the essence of the judgment is that the holding of property must be a holding for and on behalf of the members of the club, there being no transfer of property from one person to another. Proprietary clubs were distinguished, as there the owner of the club would not be the members themselves, but somebody else.

27. Shri Dwivedi sought to rely upon **Bacha F. Gazdar** (supra) for the proposition that a shareholder acquires no interest in the assets of the company, as a result of which the judgment in

Young Men's Indian Association (supra) needs to be revisited. The present appeal deals with a company that is registered under Section 25 of the Companies Act. Section 25(1) reads as follows:

> "**25. Power to dispense with "Limited" in name of charitable or other company.** – (1) Where it is proved to the satisfaction of the Central Government that an association–
> (a) is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and
> (b) intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members,
> the Central Government may by licence, direct that the association may be registered as a company with limited liability, without the addition to its name of the word "Limited" or the words "Private Limited".

28. It will thus be seen that in these companies, payment of dividend to shareholders is prohibited, and the profits, if any, have to be applied to promote the objects of the company. **Bacha F. Guzdar** (supra) did not deal with a Section 25 company - it dealt with two tea companies which were Public Limited Companies, registered under the Companies Act. It is in this context that this Court held:

> "That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the

purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them…The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in *Buckley's Companies Act* (12th Edn.), p. 894 where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company. The proper approach to the solution of the Question 1s to concentrate on the plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question. There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in *the assets of the company which would be left over after winding up* but not in the assets as a whole as Lord Anderson puts it."

In **Cricket Club of India Ltd. v. Bombay Labour Union** (1969) 1 SCR 600, this Court decided a preliminary objection taken in favour of the Cricket Club of India, that the said Club is not an "industry", and consequently, the Industrial Disputes Act, 1947 would not apply to such members' club. A contention was raised against this proposition - that the said Club had been incorporated as a limited company under the Companies Act, and would thus have to be treated as a separate legal entity apart from its members, and would therefore fall within the definition of "industry" under the Industrial Disputes Act, 1947. This was negatived by the Court, stating at page 614 of the said judgment:

> "Lastly, reference was made to the circumstance that, unlike the Madras Gymkhana Club, the Club has been incorporated as a Limited Company under the Indian Companies Act. It was urged that the effect of this incorporation in law was that the Club became an entity separate and distinct from its Members, so that, in providing catering facilities, the Club, as a separate legal entity, was entering into transactions with the Members who were distinct from the Club itself. In our opinion, the Tribunal was right in holding that the circumstance of incorporation of the Club as a Limited Company is not of importance. It is true that, for purposes of contract law and for purposes of suing or being sued, the fact of incorporation makes the Club a separate legal entity; but, in deciding whether the Club is an industry or not, we cannot base our decision on such legal technicalities. What we have to see is the nature of the activity in fact and in substance. Though the Club is incorporated as a Company, it is not like an ordinary Company constituted for the purpose of carrying on business. There are no shareholders. No dividends are ever declared and no

> distribution of profits takes place. Admission to the Club is by payment of admission fee and not by purchase of shares. Even this admission is subject to balloting. The membership is not transferable like the right of shareholders. There is the provision for expulsion of a Member under certain circumstances which feature never exists in the case of a shareholder holding shares in a Limited Company. The membership is fluid. A person retains rights as long as he continues as a Member and gets nothing at all when he ceases to be a Member, even though he may have paid a large amount as admission fee. He even loses his rights on expulsion. In these circumstances, it is clear that the Club cannot be treated as a separate legal entity of the nature of a Limited Company carrying on business. The Club, in fact, continues to be a Members' Club without any shareholders and, consequently, all services provided in the Club for Members have to be treated as activities of a self-serving institution."

29. Given the differences pointed out in **Cricket Club of India** (supra) between clubs registered as Companies under Section 25 of the Companies Act and other companies, it is clear that the *ratio decidendi* in the judgment in **Bacha F. Guzdar** (supra) would not apply to such clubs - there being no shareholders, no dividends declared, and no distribution of profits taking place. Such clubs, therefore, cannot be treated as separate in law from their members.

30. The doctrine of mutuality as applied to clubs is elaborately discussed in **Bangalore Club v. Commissioner of Income Tax and Anr.** (2013) 5 SCC 509. In discussing the fact that in

members' clubs there is a complete identity between contributors and participators, this Court held:

> "**16.** On this aspect of the doctrine, especially with regard to the non-members, *Halsbury's Laws of England*, 4th Edn., Reissue, Vol. 23, Paras 222 and 224 (pp. 152 and 154) states:
>
> "**222.** ***General features of mutual trading***.— … Where the trade or activity is mutual, the fact that as regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise.
>
> ***
>
> **224.** ***Clubs, etc.***—Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to non-members, to that extent the element of mutuality is wanting."
>
> **17.** *Simon's Taxes*, Vol. B, 3rd Edn., Paras B1.218 and B1.222 (pp. 159 and 167) formulate the law on the point, thus:
>
> "… it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered….
>
> ***
>
> It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a

similar character for purposes of the former corporation profits tax.

***

A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members. Thus, in *Carlisle and Silloth Golf Club* v. *Smith (Surveyor of Taxes)* [(1913) 3 KB 75 (CA)] , where a members' golf club admitted non-members to play on payment of green fees it was held that it was carrying on a business which could be isolated and defined, and the profit of which was assessable to income tax. But there is no liability in respect of profits made from members who avail themselves of the facilities provided for members."

18. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. Kanga and Palkhivala explain this concept in *The Law and Practice of Income Tax* (8th Edn., Vol. I, 1990) at p. 113 as follows:

"**1.*Complete identity between contributors and participators***.—'… *The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid*.' The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves: it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects."

Rowlatt, J.'s observations in **Thomas (Inspector of Taxes) v. Richard Evans & Co. Ltd.** (1927) 1 K.B. 33 were then referred to as follows:

> "… But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders even if it is limited to trading with them, makes a profit, *that profit belongs to the shareholders in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers; it comes back to them as shareholders upon their shares*. Where all that a company does is to collect money from a certain number of people—it [does not matter] whether they are called members of the company or participating policy-holders —and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand *Styles case* [*New York Life Insurance Co.* v. *Styles (Surveyor of Taxes)*, (1889) LR 14 AC 381 : (1886-90) All ER Rep Ext 1362 : (1889) 2 TC 460 (HL)] , there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand [it], is the effect of the decision in *Styles case* [*New York Life Insurance Co.* v. *Styles (Surveyor of Taxes)*, (1889) LR 14 AC 381 : (1886-90) All ER Rep Ext 1362 : (1889) 2 TC 460 (HL)] ."

Given these observations, it is clear that if persons carry on a certain activity in such a way that there is a commonality between contributors of funds and participators in the activity, a complete identity between the two is then established. This identity is not snapped because the surplus that arises from the common fund is not distributed among the members – it is enough that there is a

right of disposal over the surplus, and in exercise of that right they may agree that on winding up, the surplus will be transferred to a club or association with similar activities. Most importantly, the surplus that is made does not come back to the members of the club as shareholders of a company in the form of dividends upon their shares. Since the members perform the activities of the club for themselves, the fact that they incorporate a legal entity to do it for them makes no difference. This judgment was also followed by this Court in **Income Tax Officer, Mumbai v. Venkatesh Premises Cooperative Society Limited** (2018) 15 SCC 37. What is of essence, therefore, in applying this doctrine is that there is no sale transaction between two persons, as one person cannot sell goods to itself.

31. What arises for deliberation now is whether the 46th Amendment has done away with the principles contained in **Young Men's Indian Association** (supra) and the other judgments on the doctrine of mutuality, as applied to members' clubs.

32. It can be seen that the 61st Law Commission Report had observed that there cannot be said to be any evasion of tax as a member of members' clubs "really takes his own goods" and,

therefore, did not seek to tax such goods. The framers of the 46th Amendment thought otherwise, and made it plain that they sought to bring to tax sales made by unincorporated clubs or an association of persons to their members, as it was thought that such transactions were not taxable, as such club or associations in law has no separate existence from that of the members.

33. Quite obviously, the Statement of Objects and Reasons has not read the case of **Young Men's Indian Association** (supra) in its correct perspective. As has been noticed hereinabove, **Young Men's Indian Association** (supra) had three separate appeals before it, in one of which a company was involved. To state, therefore, that under the law as it stood on the date of the 46 th Amendment, a sale of goods by a club having a corporate status to members is taxable, is wholly incorrect. Proceeding on this incorrect basis, what the 46th Amendment sought to do was to then bring to tax sales by clubs which have no separate existence from that of their members. In so doing, the 46th Amendment used the expression "any unincorporated association or body of persons". This expression, when read with the Statement of Objects and Reasons, makes it clear that it was only clubs which are not in corporate form that were sought to be brought within the

tax net, as it was wrongly assumed that sale of goods by members' clubs in the corporate form were taxable. "Any" is the equivalent of "all". This word, therefore, also lends itself to the aforesaid interpretation, as the emphasis of the legislature is on all unincorporated associations or bodies being brought within sub-clause (e).

34. Thus, it is clear that even going by Shri Dwivedi's eloquent argument as to the intention of the legislature, as seen through the object that the legislature sought to achieve, would lead to the aforesaid expression applying only to clubs which were not in the corporate form.

35. Even otherwise, on the assumption that "unincorporated association or body of persons" must be read disjunctively, "a body of persons" cannot be equated with "person". "Person" as defined by the General Clauses Act, (which applies to the interpretation of the Constitution *vide* Article 367) reads as follows:

> "**3. Definitions.-**
>
> xxx xxx xxx
>
> (42) "person" shall include any company or association or body of individuals, whether incorporated or not;

Article 366(29-A) does not use this expression, as "person" would then include corporate persons as well. On the other hand, "body

of persons” is used to make it clear beyond doubt that corporate persons are not referred to.

36. The definition of “person” in other Acts such as the Income Tax Act, 1961 is also very wide, and includes an association of persons or body of individuals, whether incorporated or not – see Section 2(31) of the Income Tax Act, 1961. Quite clearly, this language was available and in common usage by the legislature, as the definition of “person” under the Income Tax Act has stood in the statute book since 1961. The contrast in the language of the Income Tax Act, 1961 and Article 366(29-A)(e) again leads to the conclusion that “body of persons” would not refer to the corporate form unless “person” by itself is accompanied by the expression “whether incorporated or not”.

37. Even otherwise, the “supply” of goods by an unincorporated association or body of persons has to be to a member for cash, deferred payment or other valuable consideration. As has been correctly argued by Shri Jaideep Gupta, the definition of “consideration” in Section 2(d) of the Indian Contract Act, 1872 necessarily posits consideration passing from one person to another. The definition of “consideration” as stated in the Indian Contract Act, 1872 is as follows:

> "**2. Interpretation-clause.-** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> xxx xxx xxx
>
> (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;"

The expression "valuable consideration" has, as has been pointed out in 'Pollock and Mulla, The Indian Contract & Specific Relief Acts (16th ed.)', been taken from an old English case **Currie v. Misa** (1875) LR 10 EX 153, and explained as follows:

> "A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.
>
> The above definition brings out the idea of reciprocity as the distinguishing mark; it is the gratuitous promise that is unenforceable in English law."

38. This is further reinforced by the last part of Article 366(29-A), as under this part, the supply of such goods shall be deemed to be sale of those goods by the person making the supply, and the purchase of those goods by the person to whom such supply is made. As the **Young Men's Indian Association** (supra) case and the doctrine of mutuality state, there is no sale transaction between a club and its members. As has been pointed out above,

there cannot be a sale of goods to oneself. Here again, it is clear that the ratio of **Young Men's Indian Association** (supra) has not been done away with by the limited fiction introduced by Article 366(29-A)(e).

39. But, says Shri Dwivedi, even if sub-clause (e) does not apply, sub-clause (f) would apply, given the width of its language. Here again, it is clear that the reason for sub-clause (f), as has been stated in the Statement of Objects and Reasons, is the doing away with of two judgments of this Court, namely, **State of Punjab v. Associated Hotels of India Limited** AIR 1972 SC 1131 and **Northern India Caterers (India) Ltd.** (supra).

40. This is clear not only from the Statement of Objects and Reasons, but from the subject matter of sub-clause (f) (which does not include "goods" in their entirety, but only food or any other article for human consumption, or any drink), which is the serving of such food or drink in hotels or restaurants. This is further made clear by Section 6 of the 46th Amendment Act, which is a validation and exemption provision. Section 6(1)(a) specifically refers to transactions referable to the aforesaid two Supreme Court judgments. The exemption provision puts the

matter beyond doubt. Section 6(2) of the Amendment Act reads as follows:

> "…(2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax-
>
> (a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978 and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or
>
> (b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January, 1972 and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time:
>
> Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be, clause (b), shall be on the person claiming the exemption under this sub-section."

41. Sub-clause (a) refers to 7th September, 1978, which is the date on which **Northern India Caterers** (supra) was pronounced and sub-clause (b) refers to 4th January, 1972, which is the date on which **Associated Hotels of India Ltd.** (supra) was pronounced. The 46th Amendment Act, therefore, when read as a whole, would make it clear that Article 366(29-A)(f) refers only to an undoing of the aforesaid two judgments, the subject matter

being the taxability of food or drink served in hotels and restaurants. This being the case, it is obvious that the taxability of food or drink served in members' clubs is not the subject matter of sub-clause (f).

42. Looked at from another point of view, a members' club may supply goods which are not food or drink – for example, soap, cosmetics and other household items. These items would be "goods", but would not be within sub-clause (f) - not being food or drink, and cannot, therefore, be taxed under sub-clause (f), leading to the absurd situation of the supply of food and drink being taxable in members' clubs, and the supply of other goods in such clubs being outside the tax net. For this reason also, it is clear that the subject matter of sub-clause (f) is entirely different and distinct from that of sub-clause (e), and cannot possibly apply to members' clubs. In this view of the matter, the expression "in any manner whatsoever", being part and parcel of sub-clause (f) cannot be held to extend to a supply of all goods so as to bring such goods to tax when applied to members' clubs.

43. Judgments of this Court have also held that the subject matter of sub-clause (f) related to food and drink supplied in hotels and restaurants, the deeming fiction of sub-clause (f) being

introduced only to get over certain judgments of this Court. In **K. Damodarasamy Naidu & Bros. and Ors. v. State of T.N. and Anr.** (2000) 1 SCC 527, this Court referred to Article 366(29-A)(f) as follows:

> "**9.** The provisions of sub-clause (*f*) of clause (29-A) of Article 366 need to be analysed. Sub-clause (*f*) permits the States to impose a tax on the *supply* of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (*f*) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the *supply* of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned counsel. The supply of food by the restaurant-owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant-owner must be taxed."

44. In a recent judgment of this Court, **Federation of Hotel and Restaurant Associations of India v. Union of India and Ors.**

(2018) 2 SCC 97, this Court referred to the reason for the enactment of sub-clause (f) as follows:

> "**11.** As has been stated in the trilogy of judgments in *Associated Hotels of India Ltd.* [*State of Punjab* v. *Associated Hotels of India Ltd.*, (1972) 1 SCC 472] and the two *Northern India Caterers (India) Ltd.* [*Northern India Caterers (India) Ltd.* v. *State (UT of Delhi)*, (1978) 4 SCC 36 : 1978 SCC (Tax) 198 : (1979) 1 SCR 557] , [*Northern India Caterers (India) Ltd.* v. *State (UT of Delhi)*, (1980) 2 SCC 167 : 1980 SCC (Tax) 222] , it is clear that when "sale" of food and drinks takes place in hotels and restaurants, there is really one indivisible contract of service coupled incidentally with sale of food and drinks. Since it is not possible to divide the "service element", which is the dominant element, from the "sale element", it is clear that such composite contracts cannot be the subject-matter of sales tax legislation, as was held in those judgments.
>
> **12.** Bearing these judgments in mind, Parliament amended the Constitution and introduced the Constitution (Forty-sixth Amendment) Act, by which it introduced Article 366(29-A). Sub-clause (*f*), with which we are directly concerned, reads as follows:
>
> "**366. (29-A)(*f*)** a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."
>
> A reading of the constitutional amendment would show that supply by way of or as part of any service of food or other article for human consumption is now

deemed to be a sale of goods by the person making the transfer, delivery or supply."

45. That the doctrine of mutuality has not been done away with by sub-clause (e) is also clear when sub-clause (e) is contrasted with certain provisions of the Income Tax Act, 1961. Section 2(24) (vii) of the Income Tax Act, 1961, reads as under:

"**2. Definitions.-**

xxx xxx xxx

(24) "income" includes-

xxx xxx xxx

(vii) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of the provisions contained in the First Schedule"

This has to be read with Section 44 of the Income Tax Act, 1961 which reads as under:

"**44. Insurance business.**-Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in sections 28 to 43B, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

46. A reading of the aforesaid provisions makes it clear that when profits and gains of a mutual insurance company are sought to be brought to tax, they are so done by express reference to the fact that the business of insurance is carried on by a mutual insurance company. The absence of any such language in sub-clause (e) of Article 366(29-A) is also an important pointer to the fact that the doctrine of mutuality cannot be said to have been done away with by the said 46th Amendment.

47. In fact, Section 2(24)(vii) has been expressly noticed in **Venkatesh Premises Cooperative Society Limited** (supra) as follows:

> **"14.** The doctrine of mutuality, based on common law principles, is premised on the theory that a person cannot make a profit from himself. An amount received from oneself, therefore, cannot be regarded as income and taxable. Section 2(24) of the Income Tax Act defines taxable income. The income of a cooperative society from business is taxable under Section 2(24)(*vii*) and will stand excluded from the principle of mutuality."

48. Also, Section 45(2) of the Income Tax Act, 1961 is an example of a provision by which a deemed transfer by a person to himself gets taxed. Section 45(2) reads as follows:

> "**45. Capital gains.-**
>
> xxx xxx xxx

> (2) Notwithstanding anything contained in sub-section (1), the profits and gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as, stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of Section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."

It can be seen from this provision that profits or gains arising from a transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business, is by a deeming fiction brought to tax, despite the fact that there is no transfer in law by the owner of a capital asset to another person. Modalities such as these to bring to tax amounts that would do away with any doctrine of mutuality are conspicuous by their absence in the language of Article 366(29-A)(e).

49. In light of the view that we have taken, it is unnecessary to advert to Shri Dwivedi's arguments that the explanation (1) to Section 2(10) of the West Bengal Sales Tax Act is a stand-alone provision and not an explanation in the classical sense. We, therefore, answer the three questions posed by the Division

Bench in **State of West Bengal v. Calcutta Club Limited** (supra) as follows:

(1) The doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29-A) to the Constitution of India.

(2) **Young Men's Indian Association** (supra) and other judgments which applied this doctrine continue to hold the field even after the 46th Amendment.

(3) Sub-clause (f) of Article 366(29-A) has no application to members' clubs.

50. Having gone through the judgment and order of the West Bengal Taxation Tribunal dated 3rd July, 2006 and the impugned Calcutta High Court judgment dated 1st February, 2008, and in view of the answers to the three questions referred to the present Three Judge Bench (as listed hereinabove), we are of the view that no interference is called for in the findings of fact or declaration of law in this case. Accordingly, C.A. No. 4184 of 2009 stands dismissed.

C.A. No.7497 of 2012 and other connected matters

51. Delay condoned. Leave is granted.

52. By an order dated 13th December, 2017 by a Division Bench of this Court in Civil Appeal No.7497 of 2012 and its connected matters, this Court listed these appeals involving the levy of service tax upon members' clubs as follows:

> "The issue involved in these cases has been referred to the larger Bench and the reference order is reported as 'State of West Bengal & Ors. v. Calcutta Club Ltd.' [2017(5) SCC 356][Civil Appeal No. 4184 of 2009].
>
> Let these appeals be also listed before the larger Bench along with the aforesaid matter after taking orders from Hon'ble the Chief Justice of India."

53. Primarily two judgments have been impugned before us by the Revenue; one by the High Court of Jharkhand at Ranchi in W.P (T) No.2388 of 2007 dated 15th March, 2012; and the other by the High Court of Gujarat in S.C.A. Nos.13654-13656 of 2005 dated 25th March, 2013. The impugned judgment dated 15th March, 2012 by the High Court of Jharkhand set out the relevant provisions of the Finance Act, 1994 (hereinafter referred to as the "Finance Act"), by which service tax was levied on members' clubs, and arrived at the conclusion that such clubs stand on a different footing from proprietary clubs, as has been held in **Young Men's Indian Association** (supra). The High Court following **Young Men's Indian Association** (supra) then held, stating:

> "**18.** However, learned counsel for the petitioner submits that sale and service are different. It is true that sale and service are two different and distinct transaction. The sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common in both transactions requires existence of the two parties; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service receiver. Since the issue whether there are two persons or two legal entity in the activities of the members' club has been already considered and decided by the Hon'ble Supreme Court as well as by the Full Bench of this Court in the cases referred above, therefore, this issue is no more res integra and issue is to be answered in favour of the writ petitioner and it can be held that in view of the mutuality and in view of the activities of the club, if club provides any service to its members may be in any form including as mandap keeper, then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing. However, so far as services by the club to other than members, learned counsel for the petitioner submitted that they are paying the tax.
>
> **19.** Therefore, this writ petition deserves to be allowed and it is held that rendering of service by the petitioner- club to its members is not taxable service under the Finance Act, 1994 and the writ petition of the petitioner is allowed accordingly."

54. Likewise, the Gujarat High Court by the judgment dated 25th March, 2013, followed the judgment of the High Court of Jharkhand and declared the following:

> "**8.** In the result, these petitions are allowed and it is hereby declared that Section 65(25a), Section 65(105) (zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/ amended by the Finance

> Act, 2005 to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members, to be ultra vires. Rule is made absolute with no order as to costs."

55. The appeals that are listed before us concern impugned judgments that have in essence followed these two judgments, insofar as service tax that is levied on members' clubs is concerned. The vast majority of cases before us concerns members' clubs that have been registered as Companies under Section 25 of the Companies Act, or registered co-operative societies under various State Acts, such societies being bodies corporate under the aforesaid Acts.

56. Shri Dhruv Agarwal, learned Senior Advocate appearing on behalf of the Revenue, after taking us through the relevant provisions, submitted that service tax was levied on members' clubs with effect from 2005. With effect from 2012, after statutory changes had been made, service tax continued to be levied on such clubs and was attracted even to members' clubs in incorporated form, i.e., as companies or as registered cooperative societies. According to Shri Agarwal, the principle of mutuality that is laid down in **Young Men's Indian Association** (supra) has been expressly done away with in the service tax context, as there

is in these cases no transaction of sale, unlike the sales tax cases that have just been heard. He cited a number of judgments to buttress his proposition that the High Courts of Jharkhand and Gujarat wrongly applied the judgment of **Young Men's Indian Association** (supra), which was in the context of Sales Tax acts, to Service Tax, and hence did not lay down the law correctly.

57. On the other hand, learned counsel appearing on behalf of the Respondents in these cases argued that when service tax was introduced in 1994, the legislature indicated activities which amounted to service, which were then selected for the purpose of imposition of tax. In 2005, despite the fact that members' clubs were so selected, members' clubs in incorporated form were expressly excluded from service tax. Post-2012, there was a sea change, as a result of which service tax was imposed on all taxable services, short of those which were in a negative list contained in Section 66D of the Finance Act. According to the learned counsel appearing on behalf of the Respondents, the same position that obtained re: incorporated members' clubs continued after 2012, despite the introduction of Explanation 3 to Section 65B(44). All the learned counsel argued that the doctrine of mutuality, insofar as incorporated institutions are concerned,

was not done away with in the service tax regime, and the Jharkhand and Gujarat High Court were correct in applying the judgment in **Young Men's Indian Association** (supra) to these cases.

58. As was stated hereinabove, service tax was introduced for the first time by the Finance Act, 1994. Under Section 64(3), Chapter V of the Finance Act applied to taxable services as defined, with effect from 16th June, 2005. Under Section 65(25a), "club or association" was defined as follows:

> "club or association" means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members, but does not include-
> (i) anybody established or constituted by or under any law for the time being in force, or
> (ii) any person or body of person engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry, or
> (iii) any person or body of person engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature, or
> (iv) any person or body of persons associated with press or media.

59. Under Section 65(105)(zze), "taxable service" was defined as follows:

> ""Taxable service" means any service provided-

> (zze) to its members by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount."

60. With effect from 1st May, 2011, "club or association" was defined by Section 65(25aa) as follows:

> "club or association" means any person or body of persons providing services, facilities or advantages, primarily to its members for a subscription or any other amount but does not include-
>
> (i) anybody established or constituted by or under any law for the time being in force, or
>
> (ii) any person or body of person engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry, or
>
> (iii) any person or body of person engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature, or
>
> (iv) any person or body of persons associated with press or media.

61. Likewise, in Section 65(105)(zzze), the expression "or any other person" was added after the expression "to its members", thus making it clear that the tax net had now been widened so as to include non-members of clubs or associations as well.

62. Under Section 66, it was stated that there shall be levied the tax (referred to as "the service tax") at the rate of 12% of the value of taxable services referred to in sub-clauses…(zzze) of clause (105) of section 65, and collected in such manner as may be prescribed.

63. Under Section 67, where service tax is chargeable on any taxable service with reference to its value, it was stated:

> "**67. Valuation of taxable services for charging service tax**
>
> (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -
>
> (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
>
> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
>
> (iii) in a case where the provision of service is for consideration which is not ascertainable. be the amount as may be determined in the prescribed manner."

64. Likewise, under Section 68, it was stated:

> "**68. Payment of service tax**
>
> (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed."

65. With effect from 1st July, 2012, Sections 65 and 65A were made inapplicable, and a new Section 65B introduced, in which under Section 65B(37), the term "person" was defined as follows:

> "(37) "person" includes,-
>
> (i) an individual,

(ii) a Hindu undivided family,
(iii) a company,
(iv) a society,
(v) a limited liability partnership
(vi) a firm,
(vii) an association of persons or body of individuals, whether incorporated or not,
(viii) Government,
(ix) a local authority, or
(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

66. Under Section 65B(44), "service" was defined as follows:

"(44) "service" means any activity carried out by a person for another for consideration and includes a declared service but shall not include-

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) such transfer, delivery or supply of any goods, which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or
(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

xxx xxx xxx

Explanation 3. For the purposes of this Chapter;-

> (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;
>
> (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons."

67. A new Section 66B was then introduced, which states as follows:

> "**66B. Charge of service tax on and after Finance Act, 2012**
>
> There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

68. As was stated hereinabove, service tax was thus leviable on all services as defined, short of a negative list of services which was then set out in Section 66D of the Act.

69. In an interesting judgment of this Court, **Union of India and Ors. v. Margadarshi Chit Funds Private Limited and Ors.** (2017) 13 SCC 806, this Court outlined the history of service tax as follows:

> "**19.** The amendment was carried w.e.f. 1-6-2007 whereby the words "but does not include cash management" were deleted. This provision remained on statute book up to 30-6-2012. By the Finance Act,

2012, entire scheme of service tax was completely changed and overhauled with the introduction of altogether new system of service tax. There was a paradigm shift in the service tax regime. Initially, service tax was levied only on three services by the Finance Act, 1994. The Finance Act, 1996 extended the levy to three more services. Twelve more services were brought under the service tax net by the Finance Act, 1997 and its scope was further enlarged by the Finance Act, 1998 when twelve more services were brought under the service tax net. Three services were exempted from the service tax by the Finance Act, 1998 and one more service by the Finance Act, 2000. Its scope was further widened by the Finance Act, 2001 when service tax was extended to include fifteen more services. The Finance Act, 2002 further levied service tax on ten more services. The Finance Act, 2003 brought 8 new services within the ambit of service tax. Further, the Finance (No. 2) Act, 2004 brought 13 new services under service tax which included reintroduction of service tax on 3 services and also made applicable service tax on risk cover in life insurance under the life insurance service, whereas this service was introduced in the year 2002. The Finance Act, 2005 brought 9 new services under the service tax net. The Finance Act, 2006 brought 15 new services under the service tax net. The Finance Act, 2007 brought 7 new services under the service tax net and six telecom related services were omitted and merged into one new category of taxable service. Further, the Finance Act, 2008 w.e.f. 16-5-2008, introduced 6 new services. Further, the Finance (No. 2) Act, 2009 w.e.f. 1-9-2009 introduced 3 new services. Likewise, the Finance Act, 2010 w.e.f. 1-7-2010 vide Notification No. 24/2010-ST, dated 22-6-2010 introduced 8 new services. By the Finance Act, 2011 w.e.f. 1-5-2011 vide Notification No. 29/2011-ST dated 25-4-2011, 2 new services were brought within its net and at the same time, health service was exempted w.e.f. 1-5-2011 by Notification No. 30/2011-ST dated 25-4-2011. Thus, the service tax was on a total of 115 services.

> **20.** Thus, right from 1994 till 2011, the mode adopted was to specify those services on which it was intended to levy service tax. However, Parliament by the Finance Act, 2012 w.e.f. 1-7-2012 has introduced altogether new system of taxation of services by making a paradigm shift. Now, the scheme of taxation of services is based on negative list of services. Therefore, earlier list of taxable services is no longer applicable. Instead two things have happened. First, the term "service" is defined whereas there was no definition of "service" in the Finance Act, 1994 which position remained till 2012. Earlier, each individual service on which tax was levied (known as taxable service) was defined. Secondly, the definition of "service" given now contains a negative list which is contained in Section 66-D of the Act. In other words, it specifically excludes certain transactions from the ambit of service. Thus, those transactions which are specifically excluded are not liable for service tax. Any other kind of service which qualifies the definition of "service" contained in the Act would be exigible to service tax."

70. In **All-India Federation of Tax Practitioners and Ors. v. Union of India and Ors.** (2007) 7 SCC 527, this Court upheld the constitutional validity of the levy of service tax, also stating:

> "**8.** As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas, etc. Performance based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants,

security agencies, tour operators, event managers, travel agents, etc."

After exhaustively reviewing a number of judgments, the Court stated that Parliament has legislative competence to levy service tax under Entry 97 List I of the Constitution of India.

71. With this background, it is important now to examine the Finance Act as it obtained, firstly from 16th June, 2005 uptil 1st July, 2012.

72. The definition of "club or association" contained in Section 65(25a) makes it plain that any person or body of persons providing services for a subscription or any other amount to its members would be within the tax net. However, what is of importance is that anybody "established or constituted" by or under any law for the time being in force, is not included. Shri Dhruv Agarwal laid great emphasis on the judgments in **DALCO Engineering Private Limited v. Satish Prabhakar Padhye and Ors. Etc.** (2010) 4 SCC 378 (in particular paragraphs 10, 14 and 32 thereof) and **CIT, Kanpur and Anr. v. Canara Bank** (2018) 9 SCC 322 (in particular paragraphs 12 and 17 therein), to the effect that a company incorporated under the Companies Act cannot be said to be "established" by that Act. What is missed, however, is the fact that a Company incorporated under the Companies Act or

a cooperative society registered as a cooperative society under a State Act can certainly be said to be "constituted" under any law for the time being in force. In **R.C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta** (1959) Supp. 2 SCR 641, this Court had occasion to construe what is meant by "constituted" under an instrument of partnership, which words occurred in Section 26A of the Income Tax Act, 1922. The Court held:

> "The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the *Oxford English Dictionary*, Vol. II, at pp. 875 & 876, the word "constitute" is said to mean, inter alia, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus the word in its wider significance, would include both, the idea of creating or establishing, and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of *R.C. Mitter and Sons* v. *CIT* [(1955) 28 ITR 698, 704, 705] under examination now, was not, therefore, right in restricting the word "constitute" to mean only "to create", when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of *Dwarkadas Khetan and Co.* v. *CIT* [(1956) 29 ITR 903, 907] , was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word "constitute" in the larger sense, as indicated above, the difficulty in which the learned Chief Justice of the Calcutta High

> Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds."

73. It is, thus, clear that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be constituted under those Acts. This being the case, we accept the argument on behalf of the Respondents that incorporated clubs or associations or prior to 1st July, 2012 were not included in the service tax net.

74. The next question that arises is - was any difference made to this position post 1st July, 2012?

75. It can be seen that the definition of "service" contained in Section 65B(44) is very wide, as meaning any activity carried out by a person for another for consideration. "Person" is defined in Section 65B(37) as including, *inter alia*, a company, a society and every artificial juridical person not falling in any of the preceding sub-clauses, as also any association of persons or body of individuals <u>whether incorporated or not.</u>

76. What has been stated in the present judgment so far as sales tax is concerned applies on all fours to service tax; as, if the doctrine of agency, trust and mutuality is to be applied qua

members' clubs, there has to be an activity carried out by one person for another for consideration. We have seen how in the judgment relating to sales tax, the fact is that in members' clubs there is no sale by one person to another for consideration, as one cannot sell something to oneself. This would apply on all fours when we are to construe the definition of "service" under Section 65B(44) as well.

77. However, Explanation 3 has now been incorporated, under sub-clause (a) of which unincorporated associations or body of persons and their members are statutorily to be treated as distinct persons.

78. The explanation to Section 65, which was inserted by the Finance Act of 2006, reads as follows:

> "Explanation: For the purposes of this section, taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, for cash, deferred payment or any other valuable consideration:"

79. It will be noticed that the aforesaid explanation is in substantially the same terms as Article 366(29-A)(e) of the Constitution of India. Earlier in this judgment qua sales tax, we have already held that the expression "body of persons" will not

include an incorporated company, nor will it include any other form of incorporation including an incorporated co-operative society.

80. It will be noticed that “club or association” was earlier defined under Section 65(25a) and 65(25aa) to mean “any person” or “body of persons” providing service. In these definitions, the expression “body of persons” cannot possibly include persons who are incorporated entities, as such entities have been expressly excluded under Section 65(25a)(i) and 65(25aa)(i) as “anybody established or constituted by or under any law for the time being in force”. “Body of persons”, therefore, would not, within these definitions, include a body constituted under any law for the time being in force.

81. When the scheme of service tax changed so as to introduce a negative list for the first-time post 2012, services were now taxable if they were carried out by “one person” for “another person” for consideration. “Person” is very widely defined by Section 65B(37) as including individuals as well as all associations of persons or bodies of individuals, whether incorporated or not. Explanation 3 to Section 65B(44), instead of using the expression “person” or the expression “an association of persons or bodies of individuals, whether incorporated or not”,

uses the expression “a body of persons” when juxtaposed with “an unincorporated association”.

82. We have already seen how the expression “body of persons” occurring in the explanation to Section 65 and occurring in Section 65(25a) and (25aa) does not refer to an incorporated company or an incorporated cooperative society. As the same expression has been used in Explanation 3 post-2012 (as opposed to the wide definition of “person” contained in Section 65B(37)), it may be assumed that the legislature has continued with the pre-2012 scheme of not taxing members’ clubs when they are in the incorporated form. The expression “body of persons” may subsume within it persons who come together for a common purpose, but cannot possibly include a company or a registered cooperative society. Thus, Explanation 3(a) to Section 65B(44) does not apply to members’ clubs which are incorporated.

83. The expression “unincorporated associations” would include persons who join together in some common purpose or common action – see **ICT, Bombay North, Kutch and Saurashtra, Ahmedabad v. Indira Balkrishna** (1960) 3 SCR 513 at page 519-520. The expression “as the case may be” would refer to different groups of individuals either bunched together in the form

of an association also, or otherwise as a group of persons who come together with some common object in mind. Whichever way it is looked at, what is important is that the expression "body of persons" cannot possibly include within it bodies corporate.

84. We are therefore of the view that the Jharkhand High Court and the Gujarat High Court are correct in their view of the law in following **Young Men's Indian Association** (supra). We are also of the view that from 2005 onwards, the Finance Act of 1994 does not purport to levy service tax on members' clubs in the incorporated form.

85. The appeals of the Revenue are, therefore dismissed. Writ Petition (Civil) No.321 of 2017 is allowed in terms of prayer (i) therein. Consequently, show-cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' clubs are declared to be void and of no effect in law.

……….……………………J.
(R.F. Nariman)

……………………………J.
(Surya Kant)

..……...…………………..J.
(V. Ramasubramanian)

New Delhi;
October 03, 2019